REVIVAL OF PRIOR WILL BY REVOCATION OF ONE SUBSEQUENT IN DATE. — There is much confusion in the law as to the exact effect of the destruction of a revoking will. The English common law, before the Wills Act, 1 Vict. c. 26, § 22, was based on the theory that all wills were ambulatory until the death of the testator, and that consequently a revocatory will, revoked by the testator during his lifetime, had no effect on the prior will. *Goodright* v. *Glazier*, 4 Ban. 2512. The ecclesiastical courts, however, inclined to a different doctrine, holding that the question of revival depended wholly on the intention of the testator manifested in the destruction of the later will. *Usticke* v. *Bawden*, 2 Add. Ecc. 116, 125. The Wills Act in 1837 may be said to have settled the law in England that there can be no revival without a republication. *Major* v. *Williams*, 3 Curt. Ecc. 432. But in America, where the Statute of Frauds is more generally adopted, and where the influence of the ecclesiastical courts has been strong, the decisions are arrayed on different sides of the question. Woerner on Administrations, § 52. In a recent Vermont case a testator made a second will inconsistent with his first one, though containing no express clause of revocation. He destroyed the second, later declaring to his son that he wanted the first to stand. On a careful review of the authorities, the court holds that the first will is revived, laying down the rule that no presumption arises from the mere act of destruction, but that the revival depends upon the intention of the testator. *In re Gould's Will*, 47 Atl. Rep. 1082. As to the question of presumption there is a hopeless conflict of authority. In some states mere destruction raises a presumption of revival, *Colvin* v. *Warford*, 20 Md. 357; while in others the destruction *ipso facto* does not revive the prior will. *Pickens* v. *Davis*, 134 Mass. 252. It is to be noted in the principal case that the second will was merely an implied revocation, and contained no express revocatory clause. A distinction has sometimes been taken on this ground, a revival being held possible in the former case, while impossible without a republication in the latter. *Cheever* v. *North*, 106 Mich. 390; *Scott* v. *Fink*, 45 Mich. 241. The distinction, however, it would seem, is untenable, as in general an inconsistent subsequent will has the same effect as one containing an express revocatory clause. On principle also, whether the revocation be express or implied, the mere destruction of the revoking will should raise a presumption of intestacy. If, as some courts maintain, a subsequent will revokes absolutely a prior will, it necessarily follows that there can be no revival without a republication. On the other hand, if according to the early English law the mere destruction *animo revocandi* of the second will leaves the prior will unaffected, it follows that the prior will must stand, even in cases where the testator may have intended to die intestate. Both these views tend to an undesirable result in not giving effect to the intent of the testator, and a *via media* accordingly is to be sought. The solution of the problem lies in a careful study of the act of revocation of the second will. The second will has two effects; it makes new provisions in regard to the property, and it conditionally revokes the prior will. When the second will is destroyed *animo revocandi*, the new provisions obviously are revoked, but it would seem that the revocation need not be considered as revoked unless the testator so intended. In other words, whether the destruction *animo revocandi* of the second will revokes the revocation contained in that will is a question of intent. It would seem, therefore, that the result reached in the principal case is correct. The court states, however, that the

mere act of destruction raises no presumption one way or the other. As the burden of proving the will is on the proponents, this appears in effect to be saying that there is a presumption of intestacy. The proponents have to show that the revocation has been revoked, and in order to do this they must prove, as has been suggested, some fact other than the mere destruction of the second will *animo revocandi.*

THE LIABILITY OF TELEGRAPH COMPANIES TO AN ADDRESSEE. — There has been considerable conflict of opinion over the legal status of telegraph companies. In some jurisdictions they are treated as common carriers, while in others they are permitted to contract against liability for negligence. 15 HARVARD LAW REVIEW, 158. A difference of opinion exists also as to their relations to the sender of a message, some courts holding them to be his agents, *Western Union Tel. Co.* v. *Shotter*, 71 Ga. 760; others treating them as independent principals, *Shingleur* v. *Western Union Tel. Co.*, 72 Miss. 1030. The greatest diversity of opinion, however, has arisen where liability to the addressee has been brought into question, the cases falling into two classes; one, where there has been a failure or delay in delivery, the other, where there has been a mistake in the transmission. Although no case of the first class seems to have arisen in England, the English courts have denied a recovery in the second class on grounds that would preclude a recovery in the first. *Playford* v. *United Kingdom Tel. Co.*, L. R. 4 Q. B. 106. In this country, however, recovery has been given in both classes. The decisions in the second class may be supported as grounded in tort. 14 HARVARD LAW REVIEW, 193, note 1. The principle on which the addressee in the first class can recover is more obscure. A recent Texas decision, following the majority of American cases, bases his recovery on contractual grounds. *Western Union Tel. Co.* v. *Norris*, 60 S. W. Rep. 982. The addressee is commonly treated as beneficiary, and on the doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268, is allowed to sue in contract. *West* v. *Western Union Tel. Co.*, 39 Kan. 93. This doctrine, however, is itself anomalous, is repudiated in several jurisdictions, and is nowhere applied when the third party is merely incidentally benefited. 71 Amer. St. Rep. 176. Upon this last ground one court at least has refused to apply the doctrine in an action by the addressee, even though the message was one engaging his services. *Postal Telegraph Cable Co.* v. *Ford*, 117 Ala. 672. If this, then, be the true principle, it follows that the right of the addressee is much more qualified and restricted than has been supposed.

In analogy to a theory invoked to support *Lawrence* v. *Fox*, *supra*, it has been suggested that the sender makes the contract with the telegraph company as agent for a disclosed principal, the addressee. *De Rutte* v. *New York, etc., Tel. Co.*, 1 Daly, 547. Such a theory may be resorted to where the sender acts primarily in the interests of the addressee. In the ordinary case, however, where he acts for himself or for a third party, such an agency cannot be implied except as a legal fiction, unwarranted by the facts. *Postal Telegraph Cable Co.* v. *Ford*, *supra.*

Although, as has been pointed out, the addressee may recover in tort for negligent transmission, in the absence of statutory provision no decisions have been found allowing such an action for failure to deliver, and some courts expressly deny a tort liability in such cases. *Russell* v.